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IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

THE DOW CHEMICAL COMPANY,
Petitioner,

v.

UNITED STATES OF AMERICA
BY AND THROUGH ADMINISTRATOR,
ENVIRONMENTAL PROTECTION AGENCY,
Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF MICHIGAN MANUFACTURERS' ASSOCIATION, THE OHIO MANUFACTURERS' ASSOCIATION AND MID-AMERICA LEGAL FOUNDATION AS *AMICI CURIAE* SUPPORTING PETITIONER

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This brief *amici curiae* in support of petitioner is submitted with the written consents of counsel to all parties filed with the Clerk of the Court.

INTEREST OF AMICI

Michigan Manufacturers' Association is a business association organized to study legal and administrative matters of general interest which promote the interest of Michigan businesses and the public generally.

The Ohio Manufacturers' Association is a nonprofit trade association representing approximately fourteen hundred manufacturers with facilities located in Ohio. The Association seeks to promote a healthy industrial climate for the benefit of the general welfare throughout the state.

Mid-America Legal Foundation was organized in 1975 to support the public interest in preserving the economic and political freedoms of our democratic society.

These *amici* have an interest in the disposition of this case because the opinion below interprets the Fourth Amendment in a way which effectively deprives any industrial or commercial enterprise of an expectation of privacy in its open air plant operations which are secured from public view on the ground, but visible from the air through the use of enhanced photographic techniques. If the court of appeals' decision is allowed to stand, it will be virtually impossible for industry to protect the privacy of its manufacturing processes.

SUMMARY OF ARGUMENT

EPA's aerial surveillance of Dow's Midland plant was a "search" within the meaning of the Fourth Amendment since Dow possessed a reasonable expectation of privacy in the areas of its plant that were surreptitiously photographed by EPA. Dow's subjective expectation of privacy was evidenced by its extensive plant security, and this expectation was reasonable in light of a manufacturer's significant proprietary and monetary interest in the design and operation of its plant. Furthermore, the interior regions of Dow's facility cannot be characterized as an "open field" to vitiate Fourth Amendment protection.

The EPA search of the Midland facility was unreasonable. As a general rule, warrantless administrative searches are prohibited, except in circumstances where there is an important need for these inspections and the intrusion is into an area where there is a low expectation of privacy. EPA's aerial surveillance undertaken in this case meets neither of these criteria.

Although legislative authorization of warrantless searches has been sustained where a statute narrows government discretion and specifies in considerable detail the circumstances under which such a search may be conducted, the Clean Air Act provides no justification for EPA's search of the Dow plant. This Act sets forth no limit on the time, place, manner or scope of EPA's authority to conduct inspections, and yet such detail is required if warrantless searches are to comport with constitutional requirements. The unreasonableness of the intrusion on Dow's privacy was further exacerbated by the use of highly sophisticated enhanced viewing equipment.

Finally, use of a third party by EPA to conduct the aerial surveillance violated Section 114(a)(2)(A) of the Clean Air Act. Unless this section is construed to authorize only EPA personnel to conduct inspections, the policy behind protecting trade secrets and holding government officials accountable for disclosure of confidential information will be undermined.

ARGUMENT

I. EPA's Aerial Surveillance was a "Search" Within the Purview of the Fourth Amendment.

A. The Government Intruded Upon Dow's Reasonable Expectations of Privacy.

In its decision below, the Sixth Circuit held that EPA's photographic flyover of Dow's Midland property did not constitute a Fourth Amendment search.[1] *Dow Chemical Co. v. United States,* Pet. Cert. App. A-2. The court legitimately viewed the word "search" as "a term of art with special constitutional significance," *id.,* but it proceeded to apply the term with rather too much art and too little common sense. A straightforward reading of this Court's previous cases merits the conclusion that EPA's aerial surveillance does indeed qualify as a "search" within the Fourth Amendment's purview.

"A search ordinarily implies a quest by an officer of the law." *Hale v. Henkel,* 201 U.S. 43, 76 (1906). This direct approach has of course been modified to reflect the complexities of modern day search and seizure cases, but it remains true, as the late Chief Justice Warren pointed out in *Terry v. Ohio,* 392 U.S. 1, 18 n.15 (1968), that "the Fourth Amendment governs all intrusions by agents of the public upon [private] security.... This seems preferable to an approach which attributes too much significance to an overly technical definition of 'search'...."

Generally, the question of whether government action amounts to a "search" cognizable under the Fourth Amend-

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[1] The court did not directly address the following statement made by the district court: "the Court wishes to point out that the EPA has admitted, both in its briefs and at oral argument, that the flyover constituted both a 'quest for evidence' and a 'search' of Dow's plant." *Dow Chemical Co. v. United States,* Pet. Cert. App. B-6.

ment depends upon whether the area scrutinized is one in which there exists a reasonable expectation of freedom from governmental "intrusions" and "quests". This "expectation of privacy" analysis first emerged in *Katz v. United States*, 389 U.S. 347, 353 (1967), which held *inter alia* that the government's activities in electronically listening to and recording a telephone booth conversation violated the privacy upon which Katz justifiably relied and thus constituted a search within the meaning of the Fourth Amendment. Justice Harlan in concurrence proposed a two part standard for determining when a privacy expectation is of sufficient importance that government action in derogation thereof is properly characterized as a search. 389 U.S. at 361. As amplified in *Smith v. Maryland*, 442 U.S. 735, 740 (1979), this test states that

> the application of the Fourth Amendment depends on whether the person invoking its protection can claim a 'justifiable,' a 'reasonable,' or a 'legitimate expectation of privacy' that has been invaded by government action [citations omitted]. This inquiry, as Mr. Justice Harlan aptly noted in his *Katz* concurrence, normally embraces two discrete questions. The first is whether the individual, by his conduct, has 'exhibited an actual (subjective) expectation of privacy,' 389 U.S., at 361—whether, in the words of the *Katz* majority, the individual has shown that 'he seeks to preserve something as private.' *Id.* at 351. The second question is whether the individual's subjective expectation of privacy is "one that society is prepared to recognize as reasonable", *id.*, at 361—whether, in the words of the *Katz* majority, the individual's expectation, viewed objectively, is 'justifiable' under the circumstances. *Id.* at 353.

Viewing the present case in light of these *Katz* criteria, EPA's photographic flyover impinged upon Dow's reasonable expectations of privacy in the Midland plant's unroofed connecting areas, and thus triggered application of the Fourth Amendment. That Dow possessed a subjective expectation of privacy in the scrutinized areas is abundantly demonstrated by the record and substantiated by the company's perseverance in pursuing the present protracted litigation. It is senseless to

suppose that a profit-maximizing corporation like Dow would undertake the multimillion dollar security precautions described by the district court, Pet. Cert. App. B-20,21, if it had no interest in shielding the Midland facility from undesired reconnaissance. The court of appeals determined, however, that Dow lacked a subjective expectation of privacy in the areas at issue because the company's "objective behavior [did] not indicate an expectation to be free from the aerial spectator." Pet. Cert. App. A-8. Yet the record shows that antiaircraft measures were an explicit component of Midland's security plan at the time of EPA's overflight. Jt. Appen., Ct. App., 291-306. These measures could not deter every conceivable cursory observation of Midland's interior by aerial passersby. This does not alter the fact that Dow subjectively expected freedom from detailed aerial intrusion any more than the possibility that some of Katz's conversation could conceivably have been heard through the closed door by someone waiting to use the phone booth altered Katz's subjective expectation of freedom from detailed monitoring and recording of his words. Dow sought to preserve, by the most reasonable means available, the privacy of Midland's unroofed space from aerial scrutiny. And as *Katz* teaches, "what [someone] seeks to preserve as private, even in an area accessible to the public, may be constitutionally protected." 389 U.S. at 351.

Turning to the second prong of the *Katz* test, it is clear that Dow's subjective expectation of privacy is justifiable under the circumstances of the present case. This Court has acknowledged generally that governmental action that conflicts with corporate privacy interests implicates the Fourth Amendment. *See, G.M. Leasing Corp. v. United States,* 429 U.S. 338 (1977). Society ought to be prepared to deem Dow's expectation of privacy reasonable because, as this Court has long noted, the Fourth Amendment "should receive a liberal construction, so as to prevent stealthy encroachment upon or 'gradual depreciation' of the rights secured by [it], by imperceptible practice of courts or by well-intentioned but mistakenly over-zealous exec-

utive officers." *Gouled v. United States,* 255 U.S. 298, 304 (1921).

Revelation of the make-up, configuration and management of Midland's secluded structure "exteriors" and adjacent "open spaces" threatens Dow with the loss of a competitive edge should such information come within the grasp of rival manufacturers. Society recognizes the legitimacy of Dow's interest in restricting the dissemination of such confidential information. As the district court pointed out, Pet. Cert. App. B-3, the Midland open-sky areas photographed by EPA are an essential element in the design of large integrated chemical production facilities. Although a reading of the Sixth Circuit opinion would suggest that these areas are mere vacant excess, in fact they contain pipelines, smokestacks, valves, power lines and related equipment, in addition to space consciously set aside by company planners to accommodate foreseeable expansion and design innovations. At Midland these areas are patrolled, monitored, maintained and upgraded by Dow employees. They are as vital to the profitable, efficient and safe operation of the plant as Dow's offices, control rooms, and other enclosed areas.

The chemical industry is capital-intensive and highly competitive. It does not stretch the imagination to realize that Dow possesses a valuable proprietary and monetary interest in preventing the free appropriation by its competitors—by means of the photographs now held by EPA or through any other source—of its sizeable continuing investment in how it designs, engineers, and utilizes Midland's open areas.

That society deems "reasonable" a corporation's expectation that it may keep costly proprietary information private in order to forestall erosion of its hard-won market position requires little demonstration. A host of state and federal statutes recognize the importance to our nation and our economy of allowing businesses to maintain the privacy of their commercial advantages. To cite just two prominent examples,

Congress at 5 U.S.C. § 552(b)(4) exempted trade secrets and confidential commercial information from the wide scope of the Freedom of Information Act's disclosure requirements, and at 18 U.S.C. § 1905 imposed criminal liability upon any federal official who reveals without authorization information relating to "the trade secrets, processes, operations, style of work, or apparatus . . . of any person, firm, partnership, corporation, or association. . . ." Such measures embody the overwhelming social consensus in favor of recognizing the reasonableness of privacy expectations in corporate trade secrets. Dow is clearly justified under the present circumstances in relying on the subjective expectation engendered by this unmistakable public policy.

To recapitulate, the reasonable security measures undertaken by Dow to conceal the Midland plant's unenclosed connecting areas from prying eyes evince the company's subjective expectation of privacy in those areas. This expectation is justifiable and socially reasonable because Dow possesses a significant proprietary and monetary stake in keeping from others the knowledge of how it designs and operates the Midland areas at issue. EPA intruded upon these expectations in its quest for evidence concerning Dow's possible violation of the Clean Air Act. It is precisely this kind of governmental activity that should be evaluated in light of the constitutional standards developed by this Court to determine whether such intrusion was reasonable under prevailing circumstances. EPA's flyover invaded Dow's zone of private security, and therefore constituted a search within the scope of the Fourth Amendment.

B. The Open Fields Doctrine Does Not Apply.

The court of appeals determined that EPA's photographic flyover of Dow's installation was not a search and therefore did not implicate the Fourth Amendment because "Dow's Midland plant is much more like 'open fields' than it is a home or office." Pet. Cert. App. A-9. As the court admitted, the analogy is not

perfect. In fact, the analogy defies common sense and does not accord with this Court's previous decisions. The open fields doctrine simply does not apply to a chemical factory.

The open fields concept evolved from *Hester v. United States,* 265 U.S. 57 (1924), which upheld a visual search conducted by federal revenue agents while trespassing on the open fields of Hester's land. Justice Holmes, writing for the Court, concluded that "the special protection accorded by the Fourth Amendment to the people in their 'persons, houses, papers, and effects' is not extended to the open fields." 265 U.S. at 59.

Recently, this Court reinterpreted *Hester* in light of the privacy expectation framework employed in modern search and seizure jurisprudence, and affirmed the continuing vitality of the open fields doctrine. *Oliver v. United States,* ____ U.S. ____, 104 S. Ct. 1735 (1984). *Oliver* validated a warrantless search of an agricultural field located over a mile from the nearest structure on the ground that the property's owner could assert no reasonable expectation of privacy in such an accessible area. 104 S. Ct. at 1741. The Court explained that "open fields do not provide the setting for those intimate activities that the [Fourth] Amendment is intended to shelter from government interference or surveillance. There is no societal interest in protecting the privacy of those activities . . . that occur in open fields." *Id.*

Dow's Midland plant bears no geographical resemblance to the remote cropland involved in *Oliver* or to the patch of common woods searched in the companion case of *Maine v. Thornton,* ____ U.S. ____, 104 S.Ct. 1735 (1984). As stated earlier, Midland's interior connecting areas are neither "unoccupied" nor "undeveloped." *Oliver,* 104 S. Ct. at 1742 n.11. More importantly, a far greater expectation of privacy exists in the Midland facility than in an open field. As this Court has noted, "open fields usually are accessible to the public and the police in ways that a home, an office or *commercial structure* would not be." *Id.* at 1741 (emphasis added). Dow, on the

other hand, enforces rigid access restrictions in all areas of the Midland installation. *See, Dow Chemical Co.*, Pet. Cert. App. B-20,21. Also unlike an open field, Midland's unenclosed exterior spaces serve as the setting for myriad activities connected with the pursuit of Dow's business, including storage of materials, operation of machinery, and product, safety and emission testing. This Court has recognized the social value (absent in the open field context) in protecting the privacy of such business activities, by extending to them the shelter of the Fourth Amendment. *G. M. Leasing Corp.*, 429 U.S. at 353.

In addition to this obvious divergence between the reasonableness of privacy expectations in a chemical factory like Midland and an open field, there is a second reason why it was erroneous for the court below to apply the *Hester* doctrine to the present facts: the "exterior" and "open" areas at issue are within the curtilage of Midland's enclosed structures. As noted in *Oliver*, "[a]t common law, the curtilage is the area to which extends the intimate activity associated with the [home] ... and therefore has been considered part of home itself for Fourth Amendment purposes." 104 S. Ct. at 1742. The court below declined to apply the curtilage exception to the open fields doctrine in the present case because it found such application inappropriate in a manufacturing setting. Pet. Cert. App. A-11-12. Yet the reasons proffered by the court in justification of this "inappropriateness" lack substantial merit. Although it is true that little authority exists which would extend the curtilage concept beyond traditional dwellings, at least one federal circuit has recognized the plausibility of a commercial or industrial curtilage doctrine. *United States v. Swart*, 679 F.2d 698, 702 (7th Cir. 1982).

Certainly there lurks an analytical flaw in a reading of the Fourth Amendment that accepts the shielding of traditional curtilage because it is associated with the protected privacies of home, but not the shielding of the commercially necessary connecting spaces between industrial buildings which are equal-

ly associated with the protected privacies of business. This Court should not embrace such an irrational double standard as a basis for constitutional rulings. Rather, the cogency of the industrial curtilage doctrine should be recognized, and Fourth Amendment protection accorded to the exterior spaces between Dow's buildings.

In conclusion, Dow's expectation of privacy in every area of its Midland plant is of altogether greater constitutional magnitude than that which may be asserted in an open field. Additionally, the unenclosed areas searched and photographed by EPA are within the curtilage of Midland's structures and therefore protected by the Fourth Amendment. For these reasons, the open fields doctrine does not apply in the present case.

II. EPA's Warrantless Search was Unreasonable.

A. EPA's Warrantless Surveillance Does Not Comport with Constitutional Standards for Administrative Searches.

As a general rule, warrantless administrative searches are prohibited except in certain narrow circumstances. A review of the case law which developed these exceptions mandates the conclusion that EPA's warrantless search of Dow's plant was unreasonable.

The *per se* rule of the unreasonableness of warrantless searches was first applied to the area of administrative searches by the companion cases of *Camara v. Municipal Court,* 387 U.S. 523 (1967), and *See v. City of Seattle,* 387 U.S. 541 (1967). In *Camara,* this Court reviewed the respondent's justifications for the conclusion that administrative searches could be made without a warrant, and reached a contrary conclusion regarding each of them. First, the opinion noted that the individual has an interest in limiting any governmental entry, because the administrative search could provide a pretext for entry to search for criminal evidence, and because regu-

latory legislation is enforced by criminal processes and sanctions. 387 U.S. at 531. Second, this Court stated that statutory limitations which are interpreted and applied by a government administrator, rather than a judicial officer, left individuals subject to the same discretion—that of the government agent—which the warrant requirement of the Fourth Amendment protects against. *Id.* at 530-533. Finally, the Court found that the important social need to maintain public health and safety could not justify warrantless administrative searches since the goals of the inspection could be achieved even with a warrant requirement. *Id.* at 531.

Thus, *Camara* held that legislative bodies did not have the power to enact warrantless administrative search legislation because, with few exceptions, under the Fourth Amendment any government search must be made pursuant to a warrant to be reasonable.[2]

From the firm principle set in *Camara,* several exceptions have been carved. *Colonnade Catering Corp. v. United States,* 397 U.S. 72 (1970), held that Congress could provide for warrantless searches as part of the inspection process to enforce the laws and regulations governing the liquor industry, without violating the Fourth Amendment, because the liquor industry had been "long subject to close supervision and inspection." 397 U.S. at 77. In the face of such regulatory history, the Court found *Camara* inapplicable. *Id.* at 76.

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[2] *See v. City of Seattle* applied the principle in *Camara* to commercial premises as well as private residences. The Court said, "[a]s we explained in *Camara,* a search of private houses is presumptively unreasonable if conducted without a warrant. . . . The businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his commercial property. The businessman, too, has that right placed in jeopardy if the decision to enter and inspect for violation of regulatory laws can be made and enforced by the inspector in the field without official authority evidenced by a warrant." 387 U.S. at 542.

Similarly, *United States v. Biswell,* 406 U.S. 311 (1972), held that a search by a federal treasury agent authorized by the Gun Control Act was not prohibited by the Fourth Amendment because the interstate traffic of firearms, like the liquor industry in *Colonnade,* was subject to close governmental control. 406 U.S. at 315. In rationalizing this exception, this Court pointed to the social need for governmental control of firearms and the necessity of warrantless searches for effective control because of the deterrent effect of unannounced and frequent searches. *Id.* at 316. The Court also argued that a gun dealer's justifiable expectation of privacy was not threatened by a search because the dealer chose to engage in a pervasively regulated industry and accepted a license with the knowledge that the business would be subject to inspections. Further, the Court reasoned that the Gun Control Act provides the dealer with sufficient notice of authority and limits of inspection. *Id.*

Generally, *Colonnade* and *Biswell* hold that there is an exception to the general requirement of a warrant for an administrative search when there is an important social need for warrantless inspections and the intrusion is into an area where there is a low expectation of privacy. The EPA search in the present case cannot meet the criteria of the *Colonnade-Biswell* exceptions. Although the Clean Air Act notes the need for pollution control, warrantless searches are not necessary for effective attainment of that goal. The chemical manufacturer, unlike the merchant of illegal liquor or firearms, cannot easily conceal or rapidly dispose of violations. In this instance, the slight delay of obtaining a warrant would not hinder enforcement of air quality standards.

Furthermore, it cannot be said that Dow sacrificed any justifiable privacy expectations by engaging in a pervasively and traditionally regulated industry. The chemical industry is subject to the Clean Air Act standards just as other manufacturers. Also, Dow has no license akin to that involved in *Biswell*

which provided its owner with notice of inspection. Finally, the Clean Air Act does not provide the regulated industry with annual notice of authority and limits of inspection as does the Gun Control Act construed in *Biswell.* Unlike the federal statute regulating firearms, which provides such a comprehensible and predictable inspection scheme that warrantless inspections mandated under the statute do not violate the Fourth Amendment, the Clean Air Act merely grants the EPA inspector a broad right of entry. 42 U.S.C. § 7414(a).

B. The Clean Air Act's Grant of Authority to EPA is Not Sufficiently Specific to Authorize Warrantless Inspections.

Subsequent to the development of the *Colonnade-Biswell* exception, Congress provided for warrantless inspection of work places in the Occupational Safety and Health Act ("*OSHA*"), 29 U.S.C. § 651 *et seq.* (1976). These provisions were challenged in *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978). In *Barlow's,* a corporation president refused to allow an Occupational Safety and Health Administration inspector to conduct a search without a warrant. The Administration obtained a court order requiring Barlow to admit the inspector, but Barlow again refused and brought suit seeking an injunction prohibiting the warrantless searches conducted by the Administration. 436 U.S. at 310.

The Supreme Court held that OSHA's warrantless inspection provisions violated the Fourth Amendment. This Court distinguished *Barlow's* from *Colonnade* and *Biswell,* and viewed the *Colonnade-Biswell* exception as resting on a theory of implied consent that was not applicable to businesses subject to the broad restrictions of OSHA. The opinion emphasized the additional privacy protection afforded by a warrant requirement, 436 U.S. at 323, and reaffirmed *Camara's* basic principle that a government search of private premises is reasonable only if made pursuant to a warrant. By narrowly interpreting the

Colonnade-Biswell exception as based on the implied consent of those subject to warrantless searches, *Barlow's* reaffirmed the proposition that legislatures do not have unilateral power to enact warrantless search legislation.

Another federal regulatory statute which allowed warrantless inspections was challenged in *Donovan v. Dewey,* 452 U.S. 594 (1981). In *Dewey,* the government sought to enjoin the president of Waukesha Lime and Stone Company from refusing to permit warrantless searches under the Federal Mine Safety and Health Act of 1977 ("*MSHA*"). This Court held that the warrantless inspection provisions of MSHA are reasonable within the meaning of the Fourth Amendment. 452 U.S. at 598-99. The opinion noted that

> a warrant may not be constitutionally required when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the federal regulatory presence is *sufficiently comprehensive and defined* that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections *undertaken for specific purposes.*

(emphasis supplied) *Id.* at 600.

The Court recognized the need for warrantless inspections for effective enforcement of MSHA standards, and found that the restrictions placed on the discretion of the administrators charged with enforcing the statutes met the protections provided by a warrant. *Id.* at 605. Specifically, the *Dewey* Court found the following statutory constraints critical to its holding: MSHA requires notification to the operator that inspections will be performed on a regular basis and what standards must be met to comply; MSHA directly curtails the discretion of the officials to determine what facilities to search and what violations to search for; and MSHA provides a specific mechanism for accommodating any special privacy concerns that a specific mine operator might have. Thus, *Dewey* approved the MSHA

warrantless search provision on the ground that the restrictions on administrative discretion in warrantless searches provided for in MSHA were so complete, that the loss of the additional privacy protection of a warrant requirement was justified.

Dewey does not unilaterally authorize legislatures to enact statutes providing for warrantless searches of commercial enterprises. Actually, *Dewey's* interpretation of the *Colonnade-Biswell* exception parallels *Barlow's* interpretation in that an exception to the *Camara* principle will be made only where (1) there is a low expectation of privacy on the part of those subject to the warrantless search, (2) an important social need exists for warrantless searches, and (3) there are sufficient limitations on the discretion of government agents in the use of the inspection powers.

Even under the criteria set forth in *Dewey*, the Clean Air Act cannot be construed to authorize the type of warrantless search conducted by EPA at the Dow facility. The Act does not provide the clearly defined limits on the discretion of government officials authorized to conduct searches which this Court found so critical in *Dewey*. Section 114 authorizes EPA officials to enter the premises to inspect "upon presentation of credentials." 42 U.S.C. § 7414 (a) (2). Unlike the MSHA provisions which authorized the warrantless search at issue in *Dewey*, the Clean Air Act does not similarly limit the time, place, scope or manner of EPA inspections. Without these statutory constraints, the required protections of a warrant requirement are not met. Therefore, the broad grant of authority in Section 114 cannot be construed to authorize warrantless searches.

As noted earlier, while Congress has found that a need exists for control of air pollution, it has not determined that warrantless searches are necessary to achieve this control effectively. The record in this case reveals no indication that requiring EPA to obtain a warrant would constrain the performance of its function under the Clean Air Act. Nor is there

an indication that anything impeded EPA's ability to obtain a search warrant in the first place. In fact, the time, money and energy expended in hiring the private contractor probably exceeded that necessary to obtain a warrant.

C. The Use of Enhanced Aerial Surveillance by EPA was Unreasonable.

In *Katz,* this Court reoriented its Fourth Amendment analysis to concentrate on "people, not places". 389 U.S. at 351. Such a reorientation makes Fourth Amendment protection depend on whether the conduct of government officials exceeds the reasonable expectation of privacy of the target of the investigation. Thus, an unreasonable warrantless search relies on two components: the reasonable expectation of privacy of the target and the intrusion upon that sphere of privacy by government officials. As the court in *United States v. DeBacker,* 493 F.Supp. 1078 (W.D. Mich. 1980), noted in upholding aerial surveillance of defendant's marihuana field,

> The ultimate question, therefore, is not whether the surveillance in this case occurred in 'open fields'. Instead, the issue is whether 'if the particular form of surveillance practiced by the police is permitted to go unregulated by constitutional restraints, the amount of privacy and freedom remaining to citizens would be diminished to a compass inconsistent with the aims of a free and open society.'

493 F.Supp. at 1081, *quoting* Amsterdam, *Perspectives on the Fourth Amendment,* 58 Minn. L. Rev. 349, 403 (1974). Applying this reasoning to the facts in the instant case, the unfettered use by government officials of sophisticated surveillance devices mounted on aircraft carries the most ominous implications for competitive business and society in general. Such devices can apparently be made with virtually unlimited power, if reports about the capabilities of Defense Department satellites are believed. Nothing could be kept from prying

government eyes so equipped—not trade secrets, nor the most intimate details of private life.

Courts have never upheld enhanced aerial surveillance which intrudes upon a reasonable expectation of privacy. It might be argued that *DeBacker* stands for the proposition that aerial surveillance does not constitute an unreasonable search in violation of the Fourth Amendment, since in that case the court upheld a search warrant based on the aerial observation of marihuana growing in the defendant's fields. Such a characterization of the case fails to address properly the *Katz* analysis because it only deals with the actual surveillance, and not the reasonable expectation of the target of that surveillance. In *DeBacker,* the court actually predicated its decision on the lack of any reasonable expectation of privacy of the defendant in his fields owing to the fact that other pilots might have seen the marihuana growing there. 493 F.Supp. at 1081. Similarly, the court in *United States v. Mullinex,* 508 F.Supp. 512 (E.D. Ky. 1980), only held an aerial search passed Fourth Amendment scrutiny because other airplanes frequently flew over the area and the defendant consequently could entertain no reasonable expectation of privacy in his marihuana field: "What was exposed to police aerial surveillance was also exposed to the public." 508 F.Supp. at 514. Therefore, a more precise statement of the rule for aerial surveillance would run: a warrantless aerial search only avoids unconstitutionality under the Fourth Amendment where the government officials see *only what any other pilot would have seen.*

In the instant case, however, EPA was able to see much more than any other pilot flying over the Dow plant, because of its use of sophisticated photographic equipment. The fact that the vision of EPA officials was enhanced far beyond normal human capabilities violated Dow's reasonable expectation of privacy.

The Second Circuit explicitly struck down the use of telescopic equipment to enhance vision in *United States v.*

Taborda, 635 F.2d 131 (1980). The court expressly distinguished between what might have been seen with the naked eye, and what was in fact only discerned with the aid of a telescope, when it dismissed the defendant's conviction for dealing in narcotics:

> The vice of telescopic viewing into the interior of a home is that it risks observation not only of what the householder should realize might be seen by unenhanced viewing, but also of intimate details of a person's private life, which he legitimately expects will not be observed either by naked eye or enhanced vision.

635 F.2d at 139. The court concluded that any enhanced viewing of the interior of a home intrudes upon a legitimate expectation of privacy and consequently runs afoul of the Fourth Amendment. *Id.*

To apply this reasoning to the actions of EPA officials, the method they used to enhance their aerial surveillance was functionally identical to the telescope in *Taborda*. In *Taborda*, the telescope whose use met disapproval possessed a magnification rating of 36, three times the power of a standard pair of binoculars.[3] While the magnification power of the Wild RC-10 which the EPA used is not known, its high-resolution capabilities at least give it the same qualities as a telescope; i.e., that its pictures can be blown up to effectively magnify details. If anything, a powerful camera intrudes slightly more than a telescope because it captures an image which can later be methodically examined. The effective magnification power of the RC-10 must have been at least equal to the *Taborda* telescope; the aerial survey company's brochure described it as the "finest precision aerial camera available." *Dow Chemical Co.*, Pet. Cert. App. B-3. Indeed, considerable magnification is

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[3] The same court later upheld the use of binoculars in *United States v. Lace*, 669 F.2d 46 (1982), *cert. denied*, 459 U.S. 854 (1982). However, binoculars provide only marginally enhanced surveillance, unlike the method employed in the instant case.

required to see pipes as thin as ½ inch in diameter from 1,200 feet as the RC-10 did. Pet. Cert. App. B-3. Such detail would have been impossible to discern with the naked eye at that altitude, and more importantly, Dow reasonably did not expect it to be discernible. Moreover, it does not matter that the Dow equipment scrutinized was located outside any building, unlike in *Taborda*. The only distinction which *Katz* recognizes is delineated by the existence of a reasonable expectation of privacy, and for the reasons discussed in Section I Dow legitimately entertained such an expectation.

Although respondent might argue that *United States v. Allen*, 633 F.2d 1373 (9th Cir. 1980) justifies such enhanced aerial surveillance, a closer reading of the case reveals that it is inapposite. The court upheld the Coast Guard's aerial use of telephotographic equipment to investigage a drug smuggling ring on the Oregon coast. But the court only did so where the *Katz* analysis presented no problems in contravening the defendant's reasonable expectation of privacy:

> Coast Guard helicopters routinely traversed the nearby air space for several reasons, including law enforcement. The residents of the Allen Ranch would, no doubt, have been aware of these routine flights and any reasonable person, cognizant of the ranch's proximity to the coastline and the Coast Guard's well-known function of sea-coast patrol and surveillance, could expect that government officers conducting such flights would be aided by sophisticated electronic equipment. As such, the residents could not reasonably bear a subjective expectation of privacy from the Coast Guard's airborne telephotographic scrutiny . . . .[4]

633 F.2d at 1290. The holding in *Allen* is irrelevant to the present case because, by contrast, Dow did not reasonably

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[4] Such an argument takes the *Katz* analysis too literally. It implies that any government surveillance, if longstanding enough to be expected, and no matter how intrusive, might be valid. To the extent that this argument distorts Fourth Amendment analysis, *Allen* ought to be disregarded altogether.

expect such enhanced aerial surveillance. The record contains nothing to indicate that Dow knew the area was patrolled by government aircraft, much less those carrying sophisticated surveillance equipment.

Similar reasoning applies to *United States v. Lace*, 669 F.2d 46 (2nd Cir. 1982), *cert. denied*, 459 U.S. 854 (1982). There the court upheld the use of binoculars and a spotting scope—presumably a small telescope—to observe the area between a house, a garage, and a barn clearly visible from a road, on land which hunters and swimmers had been allowed to enter freely. But in that case also, the defendant could not reasonably have harbored an expectation of privacy in that area, the court said. 669 F.2d at 50. If the area in question had not been clearly visible from the road and if defendants had attempted to exclude trespassers with a high fence and an elaborate security system, such as reasonably to lead defendants to expect privacy, *Katz* would have compelled the court to invalidate the surveillance under the Fourth Amendment. Such a situation is analytically identical to the position of Dow.

III. Use Of A Private Contractor To Conduct Warrantless Searches Is Not Authorized By The Clean Air Act.

Section 114 of the Clean Air Act, 42 U.S.C. § 7414, delineates the authority of EPA to enter the premises and conduct inspections of emission sources. In relevant part section 114 provides:

> (a) for the purpose . . . (ii) of determining whether any person is in violation of any such standard or any requirement of such a plan, or (iii) carrying out any provision of this chapter.
>
> (2) *the Administrator or his authorized representative,* upon presentation of his credentials—
>
> (A) shall have a right of entry to, upon or through the premises of such person or in which any records required to be maintained under paragraph (1) of this section are located, and

(B) may at reasonable times have access to copy any records, inspect any monitoring equipment or method required under paragraph (1) and sample any emissions which such person is required to sample under paragraph (1).

(emphasis supplied).

By hiring a private corporation to engage in the aerial surveillance of Dow's plant, EPA exceeded the grant of authority in section 114(a)(2). The pilot of the aircraft involved in the present case, an employee of Abrams Aerial Survey Corporation, was not an "authorized representative" of the Administrator within the meaning of Section 114(a)(2). Although the term "authorized representative" may at first appear ambiguous, several cases which interpret section 114(a)(2) conclude that the term must be construed narrowly to include only officers and employees of EPA and not private parties.

Section 114(a)(2) was first construed in *Stauffer Chemical Company v. Environmental Protection Agency*, 647 F.2d 1075 (10th Cir. 1981) (*"Stauffer I"*), where a chemical company refused to admit two employees of a private contractor, GCA Corporation, who accompanied a team of EPA inspectors. EPA then obtained an *ex parte* administrative search warrant authorizing it to conduct the inspection of Stauffer's plant through the two GCA employees. Stauffer filed a motion to quash the warrant. The district court permanently enjoined EPA from using GCA employees or employees of other companies in any Stauffer plant without Stauffer's permission. The Tenth Circuit affirmed this decision, holding that employees of a private company under contract with EPA are not "authorized representatives" of the EPA Administrator for purposes of section 114 of the Clean Air Act. 647 F.2d at 1079.

The court of appeals enumerated several reasons for its construction. First, the court declined to give the phrase "authorized representative" a literal interpretation, noting that the "plain meaning" test did not solve the problem. *Id.* at

1078. Next, the court analyzed the legislative history of section 114(a)(2) and referred to the joint House and Senate conference committee report which stated that in the proposed amendment, "the Senate authorized entry and inspection by DHEW personnel . . . for purposes of setting standards and enforcing them."[5] *Id., quoting* H.R. Rep. No. 1783, 91st Cong., 2d Sess., *reprinted in* 1970 U.S. Code Cong. & Ad. News, 5356, 5379-81. This Senate bill became section 114(a)(2).

The Tenth Circuit also addressed the legislative history of amendments to the Clean Water Act, 33 U.S.C. § 1251 *et seq.* (1976) (Supp. I 1977, Supp. II 1978). In 1972, Congress amended the Clean Water Act to include section 308, 33 U.S.C. § 1318(a)(B), which is virtually identical to section 114(a)(2). The court noted that the Report of the Senate Public Works Committee stated:

> It should be noted that the authority to enter, as *under the Clean Air Act,* is reserved to the Administrator and his authorized representatives *which such representatives must be full-time employees of the Environmental Protection Agency.* The authority to enter is *not* extended to contractors with the EPA in pursuit of research and development.

S. Rep. No. 92-414, 92nd Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 3668, 3729 (emphasis by the court). The court recognized that post-enactment legislative history is generally not to be accorded the same weight as legislative history concurrent with the enactment of the statute, but considered the Senate Committee's statement reliable authority due to the short interval between the enactments of section 114(a)(2) of the Clean Air Act and section 308 of the Clean Water Act. *Stauffer I,* 647 F.2d at 1079. Further, the court pointed to the close subject matter relationship between

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[5] The Clean Air Act was administered by the Department of Health, Education and Welfare before EPA was created.

the two acts and observed that a contrary holding would anomalously give EPA the power to delegate to employees of private companies the authority to enter and inspect under the Clean Water Act, but not under the virtually identical Clean Air Act. *Id.*

The "contrary holding" discussed in *Stauffer I* surfaced in *Bunker Hill Company Lead and Zinc Smelter v. United States Environmental Protection Agency,* 658 F.2d 1280 (9th Cir. 1981) where the court held that the plain meaning of "authorized representative" is broader than "officers or employees". *Bunker Hill,* 648 F.2d at 1283.

The conflict between the holdings of the Ninth and Tenth Circuits was recognized and analyzed one year later in *United States v. Stauffer Chemical Co.,* 684 F.2d 1174 (6th Cir. 1982), *aff'd on other grounds* ____ U.S. ____, 104 S.Ct. 575, (1984) ("*Stauffer II*"). The facts in *Stauffer II* were identical to those in *Stauffer I,* except they arose in a Stauffer plant at a different location. In an analytically comprehensive decision, the Sixth Circuit held that the phrase "authorized representative" in Section 114(a)(2) means officers and employees of the EPA and does not include employees of private contractors. *Stauffer II,* 684 F.2d at 1189-90.

Several policy arguments support a narrow interpretation of "authorized representatives" limited to officers and employees of EPA. One is that such an inspection is unduly intrusive when conducted by private contractors who are not subject to the same constraints against disclosure of confidential information as are government employees.

More specifically, private parties are not subject to either the criminal sanctions or the substantive confidentiality standards provided by the federal trade secrets act, 18 U.S.C. § 1905. That statute expressly protects one's privacy interest in trade secrets. To allow employees of private contractors to make inspections under the authority of section 114(a)(2) without subjecting them to the confidentiality standards for

government employees established by 18 U.S.C. § 1905 would severely undermine this policy. Finally, private contractors are not subject to the constraints of Federal Reports Act, 44 U.S.C. § 3501 *et seq.*, which governs interagency transfers of confidential information.

In summary, a private contractor is not subject to the same constraints that restrict the acts of government employees. Since these restrictions are a legitimizing factor in allowing intrusive government inspections, private contractors should not be awarded the same latitude as government employees. Accordingly, the section 114(a)(2) grant of inspection authority to "authorized representatives" should be construed to include only government employees.

CONCLUSION

For the reasons set forth above, the judgment of the United States Court of Appeals for the Sixth Circuit should be reversed and the case remanded for proceedings consistent with the rights of the petitioner.

Respectfully submitted,

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